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ABSTRACT

This paper traces the development of two 1978 acts--the Pregnancy Discrimination Act and the Age Discrimination in Employment Act Amendment--and identifies some adverse effects that each can be expected to have on the work force in school districts. Besides providing new protection to two classes of workers (the pregnant and the 45-and-over), the paper claims the acts will reduce job opportunities in the schools for qualified candidates. The role of school administrators is to assure that no children suffer from low quality instruction as a consequence of pregnant or aging employees, and at the same time assure these employees that they will not be victims of bias when their performance is evaluated. Other topics covered by the paper include disputes, cases, and congressional testimony about pregnant employees and aging workers. The paper concludes that several new restrictive obligations of employment are now in place and must be incorporated into the thinking and practice of school administrators who deal with personnel management. (Author/LD)

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Pregnancy, Aging, and Teaching Performance: A Balance in Personnel Administration

by

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Presented to the
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Background Comments

The reason teachers exist is to provide instruction in some areas of knowledge where they have expertise and where pupils and society have needs. Teachers are accountable for good performance as instructional leaders. As late as the 1960s, society assumed poor instructional performance at the onset of old age; and, for females, the same assumption was made at about the second month of pregnancy. Now, at the end of the 1970s, no such assumptions can be made, if administrators are to adhere to the law as they consider problems in personnel performance. The law is the Civil Rights Law of 1964 and subsequent legislation of that nature, but specifically, two pieces of legislation:

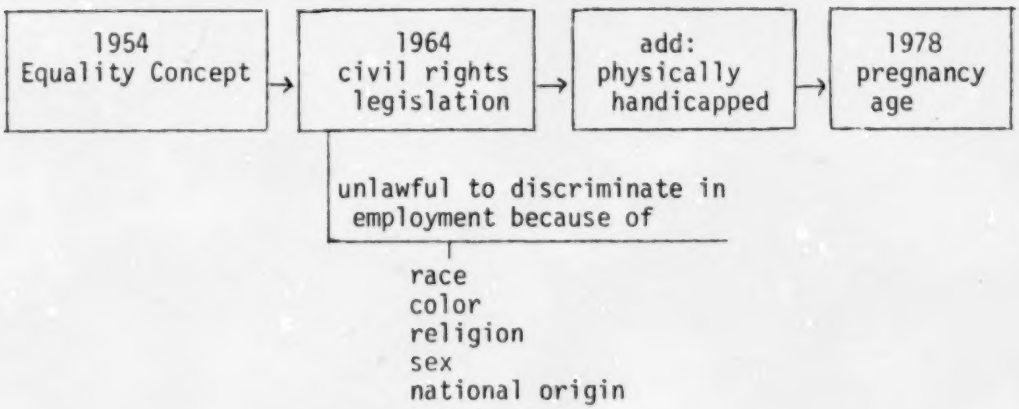
1. The Pregnancy Discrimination Act of 1978
2. The Age Discrimination in Employment Act Amendments of 1978

This paper traces some of the development of each act and identifies some effects that each will have--has had--on the work force in school districts. In addition to providing new protection to two specific classes of workers (the pregnant and the forty-and-over) the acts share another consequence. That is, they reduce job opportunities in schools for any qualified candidates who are on the outside looking in, for they assure more working days to the already employed. It is true that many employees will not take advantage of this extension of their right to work, but when those two large groups are considered as two classes of protected citizens, it is obvious that the groups will work more, consequently reducing the availability of work opportunities for others.

The place marker in American history from which it is easiest to trace the sentiment of the civil rights legislation was surely Brown v. Topeka (1954). In order to facilitate the implementation of Brown, protected groups of

citizens were identified. The word "protected" should be understood to mean identifiable and identified groups of citizens who, from the viewpoints of the present day, suffered in the past under conditions of inequality, and whose suffering indicated a need for specially advantaged status, in order that equality might be achieved in a relatively short period of time. Early legislation identified the protected categories by race (i.e., minorities), sex (i.e., females), religion, color, or national origin. Subsequently, the handicapped, the pregnant, and the other citizens have been identified as worthy of protection. This paper is focused upon the most recently identified and protected groups: 1) the pregnant and 2) the forty-and-over.

Figure I



So, entering the 1980s, school administrators must be able to demonstrate through personnel records, activity logs, and other proper documentation, a viewpoint toward personnel that is free from bias in any of the eight protected categories, for those are in the specially advantaged groupings. In passing, it should be noted that the problem is substantially more complex than it appears on the surface for two reasons: 1) each category has subsets; 2) no category is as easily identified in real life as in the abstract. For example,

under race, there are five discrete groups, four of whom are protected; under sex, there are two groups, one of which is protected. That seems simple and clear cut, but it really is not true. When only two groups are identified under the heading, sex, there are excluded other citizens who exist in our society and whose sex preferences and life styles are at substantial variance from tradition. Where do they fit? But, the big problem is still to be answered, and that concerns the category, religion. It is not a category that will long remain subdued, and it will be a knotty problem, indeed. That is, how many sub groups will there be, and which group will merit protection? The first suit under this categorical heading has been launched (in 1979), and it is on behalf of equal treatment for Catholics in a certain geographical area and in a single occupational group, bank executives.

Federal law has granted to some classes of citizens certain rights, making them protected, or benefited classes. Such statutes may be protections against discriminatory practices. Conflicts necessarily arise between those conditions and the condition of equality, the latter being a concept deeply imbedded in American political philosophy. For school administrators, the specific problem is how to assure that no children suffer from low quality instruction, as a consequence of pregnant or aging employees, and at the same time, assure pregnant and aging employees that they will not be victims of bias when their performance is evaluated.

Disputes and Cases About Pregnancy

The disputes which have surrounded pregnancy have been several, and some of them are cited below.

1. At what time may a district demand that a teacher go on maternity leave?
2. What restrictions may a district place upon return from a maternity leave?

3. What may a district do in maternity leave policies which have conservation of funds as the rationale?

4. What may a district do in maternity leave policies which have the protection of instructional integrity as the rationale?

5. At what level must a district continue to pay teachers who are on maternity leave?

Not all, but several of those disputes have been heard in the federal courts. To provide an impression of the viewpoints held by courts on pregnant school employees during the seventies, five cases have been selected, and are presented chronologically. They reveal the judicial background from which came P. L. 95-555, passed by the United States Congress on October 31, 1978, and identified as an amendment to the Civil Rights Act of 1964, Title VII. The cases, not all of which included school personnel, are presented separately. They are Buckley, LaFleur, Geduldig, General Electric and Ellerbrock.

Betty Buckley[1] was a black female, who in her first year of teaching became pregnant. The school district had a policy terminating (discharging) teachers at the sixth month of pregnancy, and Ms. Buckley was terminated. (Although Ms. Buckley also alleged racial discrimination, that is not part of this consideration).

The Tenth Circuit Court addressed the question, "Did board policy violate any constitutionally protected rights?" Ruling for Buckley, the answer was yes because while there existed no constitutional right to the job as a teacher, there did exist the right to be free of unconstitutional restrictions placed upon that employment. In this case, the board presented no compelling reasons for the arbitrary rule of termination. The court also reasoned that marriage and procreation are essential to the extension of humanity and should not be the objects of punishing regulations levied upon women; i.e., women who became pregnant.

LaFleur[2] and her colleagues were married teachers who did not wish to take unpaid maternity leave during the time stipulated by board policy. The policy

stated that pregnant teachers had to take leave commencing five months before the "expected date of the normal birth of the child." The teachers took leave in March but under duress, for they had wanted to teach the remainder of the semester. Policy also fixed the date of return as being no earlier than the beginning of the semester following the child's age of three months. Practically, the policy excluded the possibility of a teacher delivering a child at any time during the summer and not being forced to miss some work. The rationale for the policy was stated as being twofold: (1) continuity of instruction, and (2) protection of the health of the parent and the child.

The United States Supreme Court addressed the question, "Did the policy violate the Due Process Clause of the Fourteenth Amendment and/or civil barriers to the deprivation of rights?" Ruling for LaFleur, the Court answered that arbitrary termination dates had no "rational relationship to the valid state interest of preserving continuity of education." The Court noted that pregnancy put upon the employee the responsibility for substantial advance notice to the administration. With ample time for planning, personal health and classroom continuity could both be accommodated, and from medical evidence.

Boards are entitled to substantial advance notice of an impending pregnancy leave, and that lead time must be sufficient to protect continuity of instruction. On the other hand, boards may not demand arbitrary leave taking, unrelated to the actual health and vigor of the pregnant teacher. Leaves must be individualized according to the specifications of a physician. It is the responsibility of the administration to articulate quality and continuity of instruction with the Constitutionally protected rights of the teacher and the teacher's health.

In Geduldig[3], the problem under consideration was pregnancy leave without pay as a form of discrimination by sex. The state of California had a fund which was to function on an actuarially sound basis. The purpose of this state

managed fund was to pay for disabilities from working by an injury or illness not covered by workmen's compensation, and the fund was maintained for private sector employees. It had been developed by a 1 per cent annual contribution from their salary, not to exceed $85 per year. The challengers were four females who suffered unemployment disabilities from pregnancy, and within the group, only one had a normal pregnancy. Pregnancy, drug addiction and sexual psychopathy were among several excluded disabilities. The cost of including pregnancy as a disability was calculated to require worker contributions of 1.364 per cent, and a maximum of $119 (at 1972 costs).

The question which the Supreme Court agreed to address was, "Did the State or its agency discriminate on the basis of sex?" Answering against Aiello, the Court pointed out that the claims of the three abnormal pregnancies had been paid, when it was determined that the disabilities were attributable to other, covered categories. To exclude some specific disabilities from a larger group of covered disabilities was not a denial of the Due Process Clause, nor did the Equal Protection Clause "require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."

The General Electric Company[4] paid for a disability plan covering all employees for non-occupational sickness and accidents. Benefits were paid at the rate of 60 per cent of regular pay. The history of disability payments, measured either by duration of time or dollars of benefits, heavily favored female over male claimants. Pregnancy, along with a few other disabilities, was not an allowable claim. Although all pregnancies occur in females, not all females become pregnant, so the group was not seen by the Court as an even class. The Court found that pregnancy was not the only disability excluded from coverage. The history of the plan showed that the selection of risks covered did not, in fact, discriminate against females. To have held otherwise would have emphasized the fact that an employer with no disability plan for anyone would be in a more

defensible position upon accusation of violation of Title VII, Civil Rights Act of 1964. The decision also rested, in part, upon the notion that pregnancy is not a disease and is a voluntary condition; and, upon the legislative history of Title VII.

In this Minnesota case, Bernice Ellerbrock[5] was first hired in 1954. In 1955, she resigned, pregnant; did some substitute teaching through the years and was rehired, full time, in 1969. In 1974, facing release through a riffing procedure, she contended that she had really been on an extended fourteen year maternity leave and that her seniority should have been calculated from 1954, not from 1969. The state's supreme court found against the teacher, stating that there was not factual basis in contract or board policy for her claim, and in passing, also noted that there were not present any indicators of sex discrimination in her work relationship with the local board.

In these five cases, the courts spoke to questions in which pregnancy was considered as a voluntary, not an involuntary, condition. The courts recognized the freedom of an employer to develop disability benefit plans which were less than utterly comprehensive--so long as exclusions did not put a demonstrable loss upon one sex or another. The courts also considered increases in cost as one factor which could bear upon decisions about extension of benefits--and consequently higher operating costs. The courts obligated administrators to exclude pregnancy from considerations of adequate job performance.

Congressional Testimony

With the inclusion of pregnancy in the fringe benefit categories of sick leave and disability--and it may not be exempted from fringe benefit programs--some new personnel costs have been generated. While under consideration as H.R. 6075, "Legislation to Prohibit Sex Discrimination on the Basis of Sex," several people testified before the House Subcommittee on Employment Opportunities.

Speakers commented about the suitability and desirability of the statutes. Some of these comments in June, 1977, related to costs, and can be seen in Table I as those costs would affect the private employment sector with

Table I

Pregnancy as a Compensated Disability
in Selected Private Sector Negotiated Contracts (N=64)

	Duration of Disability Payments, in weeks			Range of Weekly Benefits			
	13	26	other	less than $70	$70-130	Formula	Other
Frequency	7	57	0	7	21	35	1

The most frequently occuring formula (N=57): 60% of weekly wages, but not to exceed $95 per week. (N = 23 of 35)

disability negotiated as one fringe benefit. Most of the witnesses before the committee who addressed costs were from industrial-commercial settings in which the work force was majority female--very similar to school settings. Preliminary underwriter quotations on disability insurance premiums from current carriers, accounting for the expansion of disability to include pregn ncy, were increases in the range from 20 to 30 per cent, although one employer stated that early quotes were for a 50 per cent increase.

For public school districts, the condition of employment and the pertinent fringe benefits will very likely be different from those fringes negotiated into contracts. In many states, those fringe benefits may not be in contracts, but will be found in board policy, e.g., sick leave. Beyond sick leave, two other categories of fringe benefits will be affected: health and hospitalization, and disabilities. For most schools, both of the latter benefits have long been available, but typically, pregnancy has been excluded as a compensated disability.

Moreover, pregnancy has generally been disallowed as a claim for sick leave. With hospitalization as a fringe benefit already provided, it is quite possible that districts will experience money claims for sick leave, hospitalization, and disability--all three--in a single pregnancy. Not only do personnel management administrators have a need to wrap this new legislation into their thinking. So, too, do the administrators negotiating contracts--what new fringe benefits will be granted?--and the business manager--how much will these new obligations cost, and how will they affect the budget?

Statutory Regulation

From these cases and others originating in schools (e.g., Romeo Community Schools v. HEW, 1976, in which the pregnant employee could not recover alleged lost salary under Title IX of the Education Amendments of 1972) it became apparent that the judiciary would put upon school districts some new restrictions in the administration of pregnant personnel. It also became apparent that the judiciary would not, from the Constitution or extant legislation, find employer discrimination for carrying an employee disability insurance plan exempting pregnancy as a disability. That circumstance provided the political energy to secure passage of P.L. 95-555, entitled "Pregnancy Sex Discrimination, Prohibition."

The act provided time for employers to bring fringe benefit or insurance programs into conformity. Substantially, the act stipulated:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise...nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Following the enactment of the statute, guidelines were written and have become operational under the Equal Employment Opportunity Commission. The guidelines stipulate that "the basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." From the guidelines, which include thirty-seven questions and answers designed to assist administrators in understanding the obligations of employment, five have been selected as a sampler for this paper. They provide a glimpse into this new mandate upon employers and their administrators. Each has been identified by the number given it in the guidelines.

5. Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?

   A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc.

7. Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

   A. No.

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

   A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

13. Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

    A. No.

14. Q. If an employer has an all female workforce or job classification, must benefits be provided for pregnancy-related conditions?

    A. Yes. If benefits are provided for other conditions, they must also be provided for pregnancy-related conditions.

Aging Workers and Retirement

Shifting from one protected category to another, the statutory base for the protection of workers in certain age ranges came in several statutes, but three are especially pertinent:

1. Age Discrimination in Employment Act of 1967
2. Fair Labor Standards Amendments of 1974
3. Age Discrimination in Employment Act Amendments of 1978.

Taken together, the three statutes contain the intent of Congress which was, itself, of three parts. First, Congress intended to assist older workers to keep or regain employment; second, to deter the establishment and continuation of specific upper age limits as disqualification for work; third, to "promote employment of older persons based on their ability rather than their age."

As now constructed, the acts include a long list of prohibitions aimed at employers and labor organizations, as well. Employers may not discriminate on the basis of age in such areas as hiring, promoting, transferring, or generally, may not act with prejudice to "discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment" because of age. Although some specific kinds of employees are excluded from the protection of the acts, and some employment settings are only qualifiedly included, teachers and schools are within the scope of the legislation.

At what age does protection commence and when does it end? In 1967, the protected group was in the age range of 40 to 65 years. In 1978, the range was extended, covering ages 40 to 70. That is, the protected citizens are "at least 40 years of age but less than 70 years of age." Bias on account of age is not covered by this act if the victim is 39 years of age--or 70. Under the statutes, allegations may be made, charges investigated and suits brought against employers under the general concepts of civil rights legislation. The middle aged worker, i.e., aged 40-70, has been provided with new legal protection from employers who, in the past, frequently engaged in "easing out" the mid-life employee. (Conversely, some may be fired amidst bitterness).

Employer decisions which are adverse to employees in the protected age range may be made under at least four circumstances:

1. Lack of occupational qualifications necessary for continued operation of the enterprise.
2. Individual violation of the employer's discipline code.
3. Identification of any of several factors, reasonably necessary for job performance, but not including age.
4. An employee seniority system that excludes age as one way to move toward tenure.[6]

Evaluation is an important part of organization administration, and evaluation systems should be in place. School districts that evaluate upon such criteria as classroom effectiveness, instructional techniques, and job versatility have a system which answers the tests of reasonableness but does not include age. Moreover, if employment costs are reasonable parts of reviewing any organization's effectiveness, that criterion might be used and could adversely affect long term employees. That effect would be on the basis of cost, not of age.

Enforcement continues to be the responsibility of the Secretary of Labor

(differing from discrimination on the basis of pregnancy, which is under the direction of the EEOC), but the routines necessary to seek relief from discrimination have been substantially simplified, putting upon employers an obligation for refined personnel policies and record keeping.

In Hodgson,[7] the Fifth Circuit Court heard a complaint brought by a job applicant who, at the time of the interview, was 47 years of age; i.e., within the protected range. Written comments made by the interviewer during several interviews were examined by the court. One comment for the 47 year old Mrs. Hall stipulated that she was "too old for teller." Another, for a younger woman, stated that she was a "heavy girl, may make teller." The interviewer was caught up in oral testimony which he had given earlier, when he had stated that although he labeled Mrs. Hall as too old, he really meant to write that she was too heavy. It had been a slip of the pen. With the introduction of the interview records of the 25 year old applicant, weight among applicants became a constant and age a variable.

The court issued an injunction against the employment interview practices of the organization and awarded damages to Mrs. Hall in the amount she would have earned had she been hired.

In the Palmer[8] case, statutes in the state of New York provided for retirement at age 70 for state civil servants, state judges, and public school teachers. As she approached her seventieth birthday, Lois Palmer was informed by the superintendent that, as of the next school year, she would be placed upon the roster of retired teachers, and a replacement was being sought for her. Her current performance evaluation labeled her as competent for continuation...and, she wanted to continue.

Her case originated in 1975, but moved up to the Second Circuit Court in 1978. That court gave her the advantages of the 1978 amendment, and examined

the New York statutes to determine if she was deprived of rights due her under the Constitution or under civil rights legislation. The ruling was against her, and in favor of the local board of education as it implemented the New York statutes. The court acknowledged that if Congress saw fit to do so, it could extend the mandatory retirement age beyond age 70, but stipulated that in 1978, mandatory retirement at age 70 was the option of the employer.

Coming into the 1980s, relatively few cases centering upon questions of age have developed. If other areas of civil rights are indicators of what may happen, employers will either change their practices and viewpoints about age, or litigation will increase, sharply.

Observers of the nation's employment scene have noted a conflict within the work force that, apparently, will get worse. With continued inflation has come a desire among many workers to continue in employment as long as possible. Federal law now provides that option to age 70. That extension created a bleak job picture for workers not well established in their fields, and for prospects seeking entry into the work force. That bleak picture is pervasive in schools, where physical abilities are only a modest part of the list of qualifications for adequate job performance. Coupled with an already ample supply of beginning teachers in many fields, the affected teacher generation is going to be adversely affected--it will be jolted. That adverse effect will be increasingly felt in other occupations, too, as beginners are blocked from entry.

Governance in the United States is by ethics and by political pressure. The extension of work life by way of delayed retirement was a creature of both, partly the humanitarian ethic of kindness for older persons, and partly a recognition of how many votes they have. Consequently, at the beginning of the 1980s, several new, restrictive obligations of employment are now in place and must be incorporated into the thinking and practice of school administrators who deal with personnel management. In a national setting with so many

impinging pressures, only one thing can be said with certainty; and that is, that as years pass, the locus of intensity of the political aspects of the protected class will shift. New legislation--conceivably, with substantial backlash effects against benefited and protected classes--will be enacted. In the meantime, school administrators must be scrupulously thorough in carrying out any personnel policies that impinge upon pregnant or aging employees, recognizing that they may have to defend some of their decisions as a witness in a public courtroom, responding to questions from a hostile lawyer.

REFERENCES

[1]Buckley v. Coyle (OK) Public Schools, 476 F. 2d 92 (1973).

[2]Cleveland Board of Education et. al. v. LaFleur et. al., 414 U.S. 632 (1974).

[3]Geduldig v. Aiello et. al., 417 U.S. 484 (1974).

[4]General Electric v. Gilbert et. al., 428 U.S. 125 (1976).

[5]Ellerbrock v. School District #6, 269 N.W. 2d 858 (1978).

[6]Edwond T. O'Donnell and Others. "The Federal Age Discrimination Statute: Basic Law, Areas of Controversy, and Suggestions for Compliance." Wake Forest Law Review, Vol 15, #1, February 1979, p. 5.

[7]Hodgson v. First Federal Savings and Loan, 455 F. 2d 818 (1972).

[8]Palmer v. Ticcione, 576 F. 2d 459 (1978).